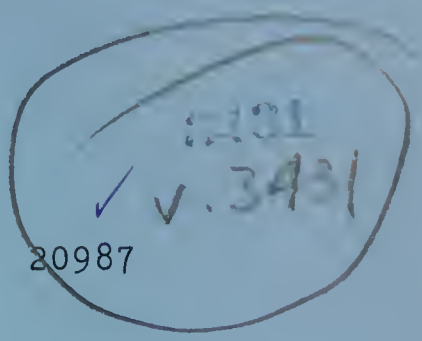
UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANDREW McGARRITY, Petitioner-Appellant, vs. LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, and THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent-Appellee.	)	No. 20987



APPELLEE'S BRIEF

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JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

On February 25, 1959, appellant, Andrew McGarrity, was convicted in the Superior Court of Los Angeles County

(Long Beach Branch), California, of the felony of first degree murder in violation of section 187 of the California Penal Code. He was sentenced on that same date to imprisonment in the State Prison for the term of his natural life.

Appellant did not appeal the above conviction. Rather, nearly seven years later, he filed a petition for a writ of habeas corpus in the Superior Court of Marin County, California. That petition (No. 44422) was denied without hearing on December 2, 1965. Thereafter, appellant filed a similar habeas corpus petition in the California Supreme Court (No. CR. 9678) which also was denied without hearing on January 26, 1966. The same factual and legal issues presented to the District Court below were raised in those petitions.

B. Proceedings in the Federal Courts

On March 9, 1966, the United States District Court for the Northern District of California, Southern Division (Burke, J.) denied appellant's motion to file in forma pauperis a petition for writ of habeas corpus (CT 1, 54). On April 5, 1966 an order was issued by District Judge Burke granting appellant's application for certificate of probable cause and allowing him to appeal in forma pauperis (CT 46, 54). A notice of appeal was filed by appellant on April 19, 1966 (CT 47, 54).

SUMMARY OF APPELLEE'S ARGUMENT

1. The District Court was not required to hold an evidentiary hearing.

A. The rule of Escobedo v. Illinois, 378 U.S. 478 (1964) may not be applied retroactively, as would be required, to affect appellant's conviction.

B. Appellant's allegations as to ineffective assistance of counsel and denial of his right of confrontation of witnesses are without substance.

ARGUMENT

THE DISTRICT COURT WAS NOT REQUIRED TO HOLD AN EVIDENTIARY HEARING.

The sole issue confronting this Court is whether the District Court, when presented with the allegations in appellant's habeas corpus petition, erred in not ordering an evidentiary hearing. We submit that the court below acted properly. Neither Townsend v. Sain, 372 U.S. 293 (1963) nor its predecessor, Brown v. Allen, 344 U.S. 443 (1963), require a district court to hold a hearing on every habeas corpus application, but only when the basic historical facts are in issue.

In the instant case the issues presented to the District Court were not of disputed facts. From the petition itself, it was clear as a matter of law that appellant was,

and is, not entitled to relief. In such a situation, the need for a district court hearing is obviated. Chavez v. Dickson, 280 F.2d 727, 734-35 & n. 15 (9th Cir. 1960). And see Townsend v. Sain, supra, 372 U.S. at 312; Brown v. Allen, supra, 344 U.S. at 463-65, 506-07; United States v. Pate, 345 F.2d 691, 696 (7th Cir. 1965); Kerrigan v. Scafati, 348 F.2d 187, 188-89 (1st Cir. 1965).

A. The rule of Escobedo v. Illinois, 378 U.S. 478 (1964) may not be applied retroactively, as would be required, to affect appellant's conviction.

Petitioner urges here, as he did below, that his conviction should be upset because an allegedly false tape recorded confession was obtained from him in the absence of counsel and because he was forced to sign a transcription of this confession without the advice of counsel. Petitioner makes this argument in reliance upon Escobedo v. Illinois, 378 U.S. 478 (1964). The District Court ruled that appellant was precluded from raising this issue since Escobedo could not be applied retroactively to affect appellant's conviction which had become final long before that decision (CT 1). The correctness of that ruling is now beyond question since the United States Supreme Court has stated definitely that its decision in Escobedo is to have purely prospective effect. Johnson v. New Jersey, 34 U.S.L. Week 4592 (U.S. June 20, 1966).

B. Appellant's allegations as to ineffective assistance of counsel and denial of his right of confrontation of witnesses are without substance.

Appellant makes the bold assertions that he was denied effective aid of counsel and denied his right of confrontation of witnesses against him. He states little more than these conclusions and the District Court therefore properly concluded that the allegations were "without substance" (CT 1) and therefore of no significance.

Considering the latter allegation first, appellant states that his landlady testified against him once in his presence but that on another occasion she testified against him while he was locked in another room (CT 22). He does not state the materiality, nature or prejudicial effect of her testimony. But more significantly, he does not even state at what proceeding he allegedly was prevented from being confronted by her. Appellant's case was submitted to the state trial court for decision on the basis of the transcript of the preliminary examination. [Such submission on the transcript was clearly proper. Wilson v. Gray, 345 F.2d 282 (9th Cir. 1965), cert. denied, 379 U.S. 983 (1965).] That being the fact, we are bewildered, as presumably was the District Court, how there could have been two proceedings at which the landlady could have testified against appellant.

The District Court could, and did, properly disregard mere "conclusionary allegations" which were "neither warranted nor supported by alleged facts." Schlette v. California, 284 F.2d 827, 833 (9th Cir. 1960). "A petition for a writ of habeas corpus is entitled to consideration, but it must in itself present sufficient facts which give it weight in order to entitle it to the issuance of a writ." United States v. Maroney, 235 F.Supp. 135, 137 (D.C.W.D. Pa. 1964). The Court properly concluded that the allegation was insufficient.

Similarly appellant's allegations as to incompetency of counsel (CT 23) are unsupported and, in the words of the District Court, "without substance" (CT 1). Certainly appellant's counsel was not incompetent, as alleged by appellant, for failing to raise an Escobedo objection to the admissibility of evidence in appellant's case in 1959. Presumably his counsel was not clairvoyant to the point of anticipating, by five years, the rule to be announced in Escobedo, and the Sixth Amendment did not, and does not, require such of counsel. Similarly the District Court was not required to second guess appellant's trial counsel for the alleged failure to object to the alleged repetition of the landlady's testimony, since such second guessing would have depended upon guessing what in fact appellant was alleging. The District Court's actions were proper.

Schlette v. California, supra; United States v. Maroney, supra.

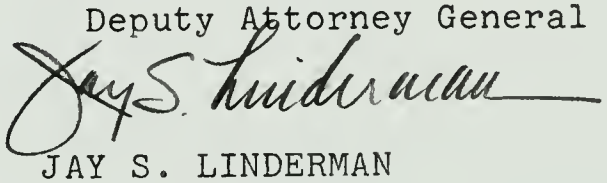
CONCLUSION

For the foregoing reasons, appellee submits that the order of the District Court should be affirmed and the proceedings herein dismissed.

DATED: July 21, 1966

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General



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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: July 21, 1966

Jay S. Linderman

JAY S. LINDERMAN
Deputy Attorney General